October Term, 1980

In the Supreme Court of the United States

No. 80-195

METROMEDIA, INC., et al.,
Appellants,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY OF ALAMEDA, CITY OF HAYWARD, CITY OF LA MESA, CITY OF ORANGE, CITY OF REDWOOD CITY, CITY OF WALNUT CREEK, CITY OF VALLEJO CITY OF HUNTINGTON BEACH

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SUBJECT INDEX

	Page
Statement of Interest	1
Summary of Arguments	2
Argument	3
The First Amendment Issue	3
I. Introduction	3
II. Extensive Regulation Has Become the Rule	9
III. The First Amendment Does Not Guarantee a Particular Mode of Advertising	10
IV. The San Diego Ordinance Does Not Improperly Limit the Dissemination of Advertising by First Amendement Standards	12
A. Introduction	12
B. The First Amendment Protects Advertising—Not Billboards	12
C. The San Diego Ordinance Qualifies Factually as a Time, Place and Manner Regulation	16
1. The Presumption of Validity and the Record	16
2. There Are Adequate Alternative Means of Advertising	20
3. The Ordinance Serves Substantial Public Interests	21
4. The Ordinance, As Interpreted, Is Not Too Restrictive	23
The Due Process Issue	26
V. Introduction	26
VI. An Exercise of the Police Power Is Not Invalid Merely Because It Would Prevent the Operation of a Particular Business	27
VII. Amortization of Nonconforming Uses Is Not Inconsistent with Due Process	28
VIII. The Bottom Line	31
Conclusion	36

TABLE OF AUTHORITIES CITED

CASES

Ackerly Communications, Inc. v. City of Seattle (1979) 92 Wash.2d 905, 602 P.2d 1177 ..... 9, 20

Agins v. City of Tiburon (1980) ....U.S....., 100 S.Ct. 2138 ..... 27, 30

Arlington Heights v. Metro Housing Dev. (1977) 429 U.S. 252 16

TABLE OF AUTHORITIES CITED (Continued)

Page

Art Neon Co. v. City and County of Denver (10th Cir. 1073) 488 F.2d 118 ..... 9, 10, 20, 29
Bates v. State Bar of Arizona (1977) 433 U.S. 350 ..... 12, 13
Berman v. Parker (1954) 348 U.S. 26, 33 22
Bread v. City of Alexander, La. (1951) U.S. 622, 642 ..... 11, 23
Capital Broadcasting Company v. Mitchell (D.C. 3 juduge court 1971) 333 F.Supp. 582, 584 10
Carry v. Population Services Intern. (1977) 431 U.S. 678 12
Caroline Products Co. v. United States (1944) 323 U.S. 18, 31 16
Central Hudson Gas v. Public Service Com'n of N.Y. (1980) ....U.S....., 100 S.Ct. 2343 ..... 13, 14, 15
City of Charlotte v. L. 660, Intra. Assn. of Firefighters (1976) 426 U.S. 283 18
Columbus Outdoor Advertising Co., In re, (1977) 51 A.D. Ohio 2d 187, 367 N.E. 2d 920 21
County of Favette v. Holman (1973) 11 Pa. Comwlth. 357, 345 A.2d 235 22
Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668 ..... 16, 18
Erznoznick v. City of Jacksonville (1975) 422 U.S. 205 15
Euclid v. Ambler Co. (1926) 272 U.S. 365 16
F.C.C. v. National Citizens Com. for Broadcasting (1978) 436 U.S. 775 779 11
Friedman v. Rogers (1979) 440 U.S. 1 13
Garcia v. Gray (10th Cir. 1974) 507 F.2d 539, 543 11
General Outdoor Advertising Co. v. Department of Public Works (1935) 289 Mass. 149, 193 N.E. 799, 808 ..... 5, 21, 22
Goldblatt v. Town of Hampstead, New York (1962) 369 U.S. 590 16
Hadacheck v. Los Angeles (1915) 239 U.S. 394 27
Harris v. Spinali Auto Sales, Inc. (1962) 202 C.A.2d 215 19
Hudgens v. N.L.R.B. (1976) 424 U.S. 507 11
John Donnelley & Sons v. Mallar (Me. 1978) 453 F.Supp. 1272 ..... 5, 19, 20, 21
Kovacs v. Cooper (1949) 336 U.S. 77 ..... 11, 23
Kelley v. Johnson (1976) 425 U.S. 238 ..... 17, 18, 21
Lehman v. City of Shaker Heights (1974) 418 U.S. 300 ..... 11, 23
Leonard v. City of Los Angeles (1973) 31 C.A.2d 473, 476 19
Linmark Associates, Inc. v. Township of Willingboro (1977) 431 U.S. 85 ..... 12, 13
Lloyd Corporation v. Tanner (1972) 407 U.S. 551 ..... 11, 23
Lubbock Poster Co. v. City of Lubbock (1978) 569 S.W.2d 935 ..... 9, 20, 30

TABLE OF AUTHORITIES CITED (Continued)

Page

Markham Advertising Co. v. State (1968) 73 Wash.2nd 405, 439 P.2d 248 ..... 9, 10, 21
Metromedia, Inc. v. City of Pasadena (1963) 216 Cal.App.2d 270 5
Modjeska Sign Studios v. Berle (1977) 43 N.Y.2d 468, 402 N.Y.S.2d 359 ..... 28, 29, 30
Moore v. Ward (Ct. App. Kty. 1964) 377 S.W.2d 881 17
Nebbia v. New York (1934) 291 U.S. 502, 525 16
New Orleans v. Dukes (1976) 427 U.S. 297, 303 18
New Orleans, Young, Kelley and Massachusetts Bd. of Retirement v. Murgio (1976) 427 U.S. 307 ..... 18, 23
Newman Signs Inc. v. Hjelle (N.D. 1978) 268 N.W.2d 741 ..... 9, 17
Ohralik v. Ohio State Bar Assn. (1978) 436 U.S. 477 13
Orr v. Foard (1929) 101 C.A. 694, 699 19
Packer Corporation v. State of Utah (1931) 285 U.S. 105 11
Paris Adult Theater I v. Slaton (1973) 414 U.S. 48, 63 17
Penn Central Trans. Co. v. City of New York (1978) 438 U.S. 104 16
People v. Stralla (1939) 14 C.2d 617 19
Philanz Oldsmobile, Inc. v. Keating (1976) 51 A.D. 437, 381 N.Y.S.2d 916 21
Primus, In re, (1978) 436 U.S. 412 13
Red Lion Broadcasting Co. v. F.C.C. (1968) 395 U.S. 367 11
Rowan v. U.S. Post Office (1970) 397 U.S. 728 11
Rubattino v. Ind. Acc. Com. (1944) 65 C.A.2d 288 19
St. Louis Gunning Advertising Company v. City of St. Louis (1911) 235 Mo. 99, 137 S.W. 929, 941 4
St. Louis Poster Advertising Co. v. City of St. Louis (1919) 249 U.S. 269 4
State of Washington v. Lotze (1977) 92 Wash.2d 52, 593 P.2d 811 ..... 9, 20
Stuckey's Stores, Inc. v. O'Cheskey (1979) 600 P.2d 258 9
Suffolk Outdoor Advertising Co. v. Hulse (1928) 43 N.Y.2d 483, 402 N.Y.S.2d 368 ..... 9, 20, 22
United States v. O'Brien (1968) 391 U.S. 367 ..... 11, 14
United States v. Treatman (C.D. Ca. 1976) 408 F.Supp. 944, 945 and 954 ft. nt. 5 15
Valentine v. Christensen (1942) 316 U.S. 52 ..... 18, 35
Varney & Green v. Williams (1909) 155 Cal. 318 5
Veterans of For. Wars Etc. v. Steamboat Springs (1978) 575 P.2d 835 ..... 9, 20, 21, 22, 23
Village of Belle Terre v. Boras (1974) 416 U.S. 1 ..... 16, 22
Virginia State Board of Pharmacy v. Virginia (1976) 425 U.S. 748 ..... 12, 13

TABLE OF AUTHORITIES CITED (Continued)

Page

Washington v. Davis (1976) 426 U.S. 229 18
Wilshire, In re, (S.D. Cal. 1900) 103 F. 620 3
Young v. American Mini Theaters (1976) 427 U.S. 50 ..... 11, 18

CODE

Bus. & Prof. Code Sec. 5226 ..... 9, 22

TEXTS

"City Signs & Lights," MIT Press, Copyright 1973, p. 12 7
21 A.L.R. 3d 1222 22
22 A.L.R. 3d 1134, 1138 29
23 U.S.C. 131 9
23 U.S.C. Sec. 131(a) 22
81 A.L.R. 3d 486 5

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Appellees.

BRIEF IN SUPPORT OF APPELLEES FILED BY AMICUS CURIAE CITY OF ALAMEDA AND OTHER CITIES LISTED HEREIN

STATEMENT OF INTEREST

The City of Alameda has for almost seven years been engaged in litigation to enforce its off-premise advertising ordinance. While the ordinance is different from the one before this court the issues raised and addressed in the Alameda litigation have been the same. Moreover, Alameda has other cases pending, not related to billboards, which present similar issues. Alameda presented the amicus curiae brief on behalf of many California cities in the state ac-

tion. Many of those cities have joined in this brief. They are listed on the signature page. Most of them have ordinances similar to San Diego's ordinance.

SUMMARY OF ARGUMENTS

The First Amendment Issue: The First Amendment does not guarantee the right to sell advertising space on extremely large signs placed at the most obtrusive locations. The San Diego ordinance, as construed by the California Court, only applies to billboards.

Appellants' business is not synonymous with outdoor advertising. There are other existing forms exempted by the ordinance. More importantly, there is a plethora of other devices available to carry the messages now seen on these large structures.

If this court determines that a billboard mode of outdoor advertising must be permitted as well as the other forms of outdoor advertising, this court need only limit the application of the ordinance to signs 12 x 24 feet and larger. Invalidating the ordinance entirely would be miscontrued as an indication that no regulation of billboards can succeed.

This issue should be decided by reference to the prospective application of the ordinance. Amortization is not a First Amendment issue.

The Due Process Issue: The due process clause does not afford appellants vested rights to maintain their

nonconforming structures. Amortization provides a reasonable resolution between private losses and public benefits. Eminent domain "taking" concepts are inapplicable, and in the context of this case contrary to the sound public policy. Experience gained over the years by legislative bodies is not outlawed or made prohibitively expensive by the Constitution because it takes the form of changes in zoning laws.

ARGUMENT

THE FIRST AMENDMENT ISSUE

I.

INTRODUCTION

The conflict between outdoor advertising in the form of billboards and public health, safety and welfare dates at least to the turn of the century. *In re Wilshire* (S.D. Cal. 1900) 103 F. 620. The character of billboards and the arguments advanced by their promoters have changed very little. One early case described them thusly:

> "Speaking generally, plaintiff's business consists of outdoor advertising, displayed at conspicuous points and places and by means of pictures, signs and letters. The more conspicuous and public the place the greater is the desire to cover it with that class advertisements. The privacy of the home, places of public resort, retreats for rest and recreation, seats of learning and even the sanctity of the church are as much within

> the shadow of the structure hereinafter described as are the vacant lots and commanding views along the public thoroughfares of the City. The walls and roofs of many residences and business houses are not exempt from this intrusion. While all kinds of business and merchandise are advertised by this means of display, yet observation and common experience teach us that probably the greater percent thereof proclaim the newest and choicest brands of liquors, tobacco, cigars and cigarettes, and announcements of various plays which are to be presented at the various theaters." *St. Louis Gunning Advertising Company* v. *City of St. Louis* (1911) 235 Mo. 99, 137 S.W. 929, 941, app. dism. 34 S. Ct. 325.

Many of the arguments made today against ordinances regulating billboards were made in the *St. Louis Gunning* case and rejected by that court. Seven years later this Court followed that decision. *St. Louis Poster Advertising Co.* v. *City of St. Louis* (1919) 249 U.S. 269. Mr. Justice Holmes even implied that the exclusion of billboards would not violate the Constitution. The mode of constructing billboards at that time was such that they were dangerous to the physical well-being of pedestrians and a sanctuary for filth and crime. Long after this Court had approved ordinances which eliminated the more obvious health, safety and blight problems associated with billboards, the promoters of this industry were still asserting a "constitutional right . . . to conduct their

business of outdoor advertising as they had been accustomed without interference by the enforcement of rules and regulations adopted by defendants." *General Outdoor Advertising Co.* v. *Department of Public Works* (1935) 289 Mass. 149, 193 N.E. 799, 808, app. dism. 56 S. Ct. 495. The *General Outdoor Advertising* case is still the basic primer on the subject of billboards. *John Donnelley & Sons* v. *Mallar* (Me. 1978) 453 F. Supp. 1272 brings it up to date. *See*, also, 81 ALR3d 486. Most of the arguments made today by the industry were discussed there and rejected. The extensive fact finding review made by the court still applies to many of the effects of billboards today and those few arguments against regulation which the court approved (based on the aesthetic limitations) no longer lie.

Although the more blatant adverse effects of billboards have been eliminated by regulations, their more subtle adverse effects have either been overlooked or attempts to regulate them have been frustrated by earlier decisions which would not recognize more aesthetically oriented police power objections. *See, Varney & Green* v. *Williams* (1909) 155 Cal. 318, reversed by the case at bench. Those decisions are no longer viable.

The more subtle effects of billboards have become more obvious as they continue to increase in size and number.[1] They have become the biggest artifact

[1] *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, hear. den., app. dism., 84 S. Ct. 636, recognized the "nuisance fostered by billboards . . ." at p. 276.

seen in any city that did not have the good sense not to permit them at the outset. They dominate skylines and overpower messages from smaller businesses and information signs. They congregate in certain locations to an extent that they become the principal item in the visual landscape of that area. In short, in many areas, all other functions of the city, from a visual standpoint, have become secondary to an incidental, if not non-functional, aspect of any city's architecture, the advertising of certain consumer items. These consumer items are usually advertised by identical ads in stores, transit systems and (except for liquor and cigarettes) radio and television. The imbalance or out-of-focus or out-of-scale or even ugly effect of this lack of proportion in form and function tends to give many people a feeling of uneasiness about their environment. Must we be cajoled into buying something everywhere we go? Many cities are trying to return a sense of proportion to their streets.

> "Of all private signing, billboards most frequently conflict with the needs of the public. They skew communications systems so that local information is obscured and particular destinations are made more difficult to find. Unlike most other advertising, billboards cannot be turned off or ignored at will. They are thus a direct violation of the individual's privacy for someone else's profits.

"Billboards located adjacent to complex, high volume urban highways and at major intersections are a safety hazard because they distract the driver's attention. In historic districts, such as those in Boston, the case against billboards and other large signs is clear. It is equally clear in residential areas. Businessmen in some shopping areas have taken joint action to remove billboards because they detract from local character. Arguments like those which apply to protection of natural scenery might also be made for protection of the city skyline from dominance by advertisements.

"There is a growing public concern with these supersigns. In order to preserve views of the natural landscape, the federal government now provides incentives for outlawing billboards along interstate highways. The State of Vermont has done away with them altogether on the grounds that they are bad for the tourist industry as well as highway safety. Many small cities, self-conscious about the appearance of their local environment, have passed anti-billboard ordinances."

"City Signs & Lights," MIT Press, Copyright 1973, p. 12.

The term aesthetics embraces much more than personal preference. One's values, indeed the values of society, are expressed aesthetically.[2] Americans have invested billions on the most inefficient kinds of automobiles, raincoats that are not waterproof

and all manner of non-functional items for no other reason than aesthetics.

All the thoughtful design which an architect can lavish on a building, or a tree crew on street trees, goes for naught by juxtapositioning them with billboards. If the apologists of billboards do not see aesthetic damages caused by those structures it is unfortunate that action was not taken sooner. Apparently the damage has already been done. The Bull Durham signs that were once painted on the roofs of barns have become monolithic steel structures blocking out the sky, seen from countless intersections traveled by millions of people. Man changes the environment only to have the changed environment change him. One of those changes is an ever increasing insensitivity to that environment.[3] If appellants' arguments are accepted by this Court that cycle will continue. If nothing else, years of more delays will result from a reversal. The Constitutional right sought here is the right to maintain large *structures*, immune from the normal exercise from the police power, simply because they have had messages pasted on them for a period of years. Reversal would give, at least, the appearance that the court accepts that theory. Such a decision would create manifest difficulties even for those cities which have adopted narrower ordinances and better records.

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[2] In Biblical terms, man does not live by bread alone. Joshua 8:3 and Matthew, Chapter 4, Verse 4.

[3] In this regard a total ban on the present "billboard" form (usually 300 sq. ft. and larger) is the only remedy. *See*, Jurisdictional Statement, p. 26.

II.

EXTENSIVE REGULATION HAS BECOME THE RULE

It is now valid national policy to eliminate billboards from the view of those locations where they are most effective: the national (and states) freeway systems. 23 U.S.C. 131; *Markham Advertising Co.* v. *State* (1968) 73 Wash.2nd 405, 439 P.2d 248, app. dism., 393 U.S. 316; *Stuckey's Stores, Inc.* v. *O'Cheskey* (1979) 600 P.2d 258; app. dism., 64 L. Ed.2d 783; and *State of Washington* v. *Lotze* (1977) 92 Wash.2d 52, 593 P.2d 811, app.dism., 100 S. Ct. 257.[1] Extensive and exclusionary regulations have been sanctioned over the years. *Lubbock Poster Co.* v. *City of Lubbock* (1978) 569 S.W.2d 935, cert. den., 100 S.Ct. 63; *Suffolk Outdoor Advertising Co.* v. *Hulse* (1928) 43 N.Y.2d 483, 402 N.Y.S.2d 368 app. dism., 439 U.S. 808; *Newman Signs Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, app. dism., 99 S. Ct. 1205; *Veterans of For. Wars Etc.* v. *Steamboat Springs* (1978) 575 P.2d 835, app. dism., 439 U.S. 809; *Ackerley Communications, Inc.* v. *City of Seattle* (1979) 92 Wash.2d 905, 602 P.2d 1177, app. dism., ...U.S.....; *Art Neon Co.* v. *City and County of Denver* (10th Cir. 1973) 488 F.2d 118, cert. den., 94 S.Ct. 2644 and those cases cited *infra*. Unquestionably, the regulation of the size, height and location of signs constitutes a valid time, place and manner exercise of the police power. All of these cases sanction significant limitations on locations all the way from zon-

[1]That is the policy of the State of California also. Bus. & Prof. Code Sec. 5226.

ing district bans to city or state and even national systems bans. In many the application of or exemptions to the ordinance does not permit the "characterization of a "total ban" but total bans are discussed and approved in *Steamboat Springs*,[5] *Art Neon*[5] and *Suffolk, supra.*

We will, therefore, limit our discussion here essentially to the total ban claim on the assumption that this Court is not prepared to reverse long years of hard, yet-to-be-won, struggles to control visual blight.

III.

THE FIRST AMENDMENT DOES NOT GUARANTEE A PARTICULAR MODE OF ADVERTISING

"There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech." *Markham Advertising, supra,* at p. 263. Appellants are not advertisers and have no standing on this issue. They stand only to lose the right "to collect revenue from others for broadcasting their commercial message."[6] *Capital Broadcasting Company* v. *Mitchell* (D.C. 3 judge court 1971) 333 F.Supp. 582, 584, aff., 405 U.S. 1000. (Ban on cigarette advertising.) They seek to obtain that right by implying that without their present mode of operation certain advertising will cease. Even if that claim were colorable, it should

[5]It is hard to tell from those two opinions whether this is *dicta* or the holding. *Steamboat Springs* provides a good discussion and citations on significant prohibitions.

[6]See footnote 14 of the California Supreme Court's opinion in this case.

not prevail. "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." *Breard* v. *City of Alexander, La.* (1951) 341 U.S. 622, 642 (on soliciting) and *Garcia* v. *Gray* (10th Cir. 1974) 507 F.2d 539, 543, cert. den., 421 U.S. 971 (no picketing). Even in the pure speech area there is no right to broadcast by all possible means. *Red Lion Broadcasting Co.* v. *F.C.C.* (1968) 395 U.S. 367[1] (equal time), *Lehman* v. *City of Shaker Heights* (1974) 418 U.S. 300, (transit signs), *Hudgens* v. *N.L.R.B.* (1976) 424 U.S. 507 (shopping centers), *United States* v. *O'Brien* (1968) 391 U.S. 367 (burned draft card), *Kovacs* v. *Cooper* (1949) 336 U.S. 77 (sound trucks), *Packer Corporation* v. *State of Utah* (1931) 285 U.S. 105 (ban on tobacco ads), *Rowan* v. *United States Post Office* (1970) 397 U.S. 728 (adult mail), *Young* v. *American Mini Theaters* (1976) 427 U.S. 50 (adult materials) and *Lloyd Corporation* v. *Tanner* (1972) 407 U.S. 551 (shopping centers).

First Amendment "guarantees are subject to the police power" which may "insure" such things as "tranquility." *Garcia*, at p. 544. "The scope of the police power is to be measured by the legislative will of the people upon questions of public concern." *Gar-*

[1] "It is the right of the viewers and listeners, not the broadcasters, which is paramount," at p. 390. *Acc., F.C.C.* v. *National Citizens Com. for Broadcasting* (1978) 436 U.S. 775, 779.

cia, at p. 544. The "city council may speak for the citizens on matters subject to the police power" in the First Amendment area. *Breard*, at p. 644. The people of many cities, through their elected representatives, have decided that balancing issue against billboards.

IV.

THE SAN DIEGO ORDINANCE DOES NOT IMPROPERLY LIMIT THE DISSEMINATION OF ADVERTISING BY FIRST AMENDMENT STANDARDS

A. Introduction

The *ratio decidendi* of appellant's argument (thinly veiled) is that they provide a medium of communication which is indispensible to a significant number of advertisers. That is their hope, to assert standing on this issue. Nothing in the record supports that assertion of fact. Nothing in the law requires a city to provide a medium of 300-plus square-foot signs visible from the most frequently traveled areas of the city. We shall discuss the latter first.

B. The First Amendment Protects Advertising—Not Billboards

There is now a body of work on the right to advertise. *Virginia State Board of Pharmacy* v. *Virginia* (1976) 425 U.S. 748, *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85 (1977), *Carey* v. *Population Services Intern.* (1977) 431 U.S. 678, *Bates* v. *State Bar of Arizona* (1977)

433 U.S. 350, *In Re Primus* (1978) 436 U.S. 412,[8] *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 477, *Friedman* v. *Rogers* (1979) 440 U.S. 1 and *Central Hudson Gas* v. *Public Service Com'n of N.Y.* (1980) ....U.S....., 100 S.Ct. 2343. With one inapposite exception, none of these cases apply to "media" claims. All agree that the protection afforded advertising is very limited. The doctrine of overbreadth does not apply.[9] *Bates* and *Freidman*. All those cases (with the same exception) concern a prohibition against conveying a specific item of information to an interested public. The San Diego ordinance does not stop druggists from advertising their prices (*Virginia State Board*), conveying contraceptive information (*Carey*) or bar all promotional advertising (*Central Hudson Gas*). These cases are clearly inapposite. While *Linmark* considered a ban on "for sale" signs attached to residential properties, the unique relationship of those signs to the ability of home owners to sell their own houses gives that ban more than a secondary impact on the right to advertise. Moreover, the means of promoting the state interest were poorly, if not ineffectively, designed to serve the public interest asserted. That case is also inapposite here. *Friedman*, which held that use of a trade name is not protected, is closer in point. Billboards, by their nature, are used to promote product, candidate, slogan,

[8] *Primus* is not strictly a commercial speech case. More was involved than advertising. It is clearly distinguishable and will not be discussed further. (Letter from ACLU Lawyer to an interested person.)

[9] That alone should be dispositive of this case. It is only by an overbreath type of analysis that anyone can assert that a limitation on signs is a ban on advertising.

and idea (sometimes), *identification*. They are not used for discussion. Their normal use is analogous to the use of trademarks.

The tests applied by this Court in advertising cases are instructive here. This Court has, in virtually all of these cases, recognized the durable, hardy nature of advertising. Quite correctly, this Court perceives that advertisers are not meek, mild, timid or without considerable resources and imagination with which to sell their wares. Consequently, this Court has applied a test more like that applied to an exercise of the police power not impacting speech. That is in keeping with the symbolic speech cases. *See, O'Brien.* Although variously stated, it appears that legislation reasonably designed to advance a police power objective does not run afoul of the First Amendment if appropriate methods of conveying the information involved remain untouched. The presumptions applicable to and tailoring (overbreadth) requirements of pure speech cases do not apply. Some confusion on the overbreadth question may have been generated by the Court's plurality opinion last term. *Central Hudson Gas* does say that the crucial question is whether the regulation is no more extensive than necessary.[10] That is understandable under the facts of that case where *all* promotional advertising was banned. Under those circumstances, no alternative channels could be available. The stated purpose

[10] The opinion in chief of only three Justices.

of the ban was energy conservation. The crucial question was whether an advertising ban was appropriate for that purpose. The concurring opinions were most concerned that the impact of such a broad ban would regulate more than commercial speech. They were quick to point out, however, that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." At p. ...., (100 S.Ct. 2358).[11] We do not believe that *Central Hudson* has introduced overbreadth analysis into commercial cases. There the regulation even prevented advertising of energy-saving devices. It was actually counter-productive to its purpose.

Appellants' reliance on *Erznoznick* v. *City of Jacksonville* (1975) 422 U.S. 205 and other overbreadth cases is misplaced. That case holds that a city cannot "discriminate in the regulation of expression on the basis of the content of that expression" although the time, place and manner of distribution may be regulated even where it might result in a total ban on the use of facilities, *Hudgens*, at p. 520. *Jacksonville* simply sought to mask censorship rather than "aid individuals in insulating themselves from unwanted" publications. *United States* v. *Treatman* (C.D. Ca. 1976) 408 F.Supp. 944, 945 and 954 ft. nt. 5. (Use of mails re unwilling receivers.) *Rowan* permits the kind of "media ban" involved here. A specific type

[11] Citing *Ohralik* which noted that putting commercial speech on a parity with other speech would devitalize the First Amendment by a process of leveling, at p. 456.

of material (cryptic images suitable for billboards) cannot be conveyed by a specific device (large outdoor signs).

C. The San Diego Ordinance Qualifies Factually as a Time, Place and Manner Regulation

1. The Presumption of Validity and the Record

A presumption of validity favors legislation; debatable questions are resolved in favor of the legislation, and if any facts which reasonably could be assumed afford support for the legislation, it will be upheld. *Goldblatt* v. *Town of Hampstead, New York* (1962) 369 U.S. 590. Land use regulations have been given great latitude. *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, *Arlington Heights* v. *Metro Housing Dev.* (1977) 429 U.S. 252, *Village of Belle Terre* v. *Boras* (1974) 416 U.S. 1, Eastlake v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668, and *Penn Central Trans. Co.* v. *City of New York* (1978) 438 U.S. 104. Regulations of primarily economic impact are also given wide latitude. A "clear and convincing showing that there is no rational basis" for them is required to invalidate them. *Carolene Products Co.* v. *United States* (1944) 323 U.S. 18, 31 and See, *Nebbia* v. *New York* (1934) 291 U.S. 502, 525. The economics of the advertising industry may be altered somewhat (shifts to other areas or other forms), but no fundamental civil right is touched by this ordinance.

The presumption of validity-afforded ordinances reflects the experience of many decades of judicial efforts to insure that ordinances expressing the determinations of the people's representatives are not cast aside by the difficulties inherent in litigation. The ability of the advocate to make fiction more real than facts, gain advantages procedurally or simply overpower places legitimate ordinances in jeopardy. The presumption of validity prevents powerful interests from sweeping away legislative determinations by advocacy alone. It places a subtantial burden on the challenger. These principles apply equally to regulations impinging on the exercise of expression, which, although protected by the First Amendment, does not constitute speech historically identified with the maintenance of a free society. *See, Kelley* v. *Johnson* (1976) 425 U.S. 238. In that case the Circuit Court had applied the compelling state interest test to a police department hair length regulation. Undoubtedly, if the department had been required to shoulder the burden of going forward with proof that a connection between hair length and safety existed, it would have faced very difficult evidentiary problems.[12] This court relieved the department of such difficulties, in effect, accepting the opinion testimony of those supporting the rule, and held that the challenger had not demonstrated "that there is no rational connec-

[12] Nothing in the constitution prohibits a (legislative body) from reaching a particular conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* v. *Slaton* (1973) 414 U.S. 48, 63. *See, Moore* v. *Ward* (Ct. App. Kty. 1964) 377 S.W.2d 881, *Newman Signs* and the California Supreme Court's opinion in this case, at p. 859.

tion between the regulation" and "the promotion of safety of persons and property." At p. 247. The record does not show that the ordinances are so "irrational" that they are an "arbitrary exercise of the police power." *Kelley*, at p. 248. "In short, the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations" absent the involvement of fundamental rights. *New Orleans* v. *Dukes* (1976) 427 U.S. 297, 303. Similar statements were made by this Court in a First Amendment case with the additional comment that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Young, supra*, at p. 71.[13] In a previous term the Court made it quite clear that it would apply compelling interest tests sparingly. *City of Charlotte* v. *L. 660, Intra. Assn. of Firefighters* (1976) 426 U.S. 283, *Washington* v. *Davis* (1976) 426 U.S. 229, *Eastlake* v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668, *New Orleans, Young, Kelley and Massachusetts Bd. of Retirement* v. *Murgio* (1976) 427 U.S. 307. All of these cases deal with what once might have been thought fundamental rights.

One cannot imagine a better case for the application of these principles. The results of lopsided advocacy are evident in the stipulation of facts.[14] Some

[13] *State of Washington* found a compelling interest in billboard removal.

[14] At the time San Diego entered into the Stipulation it had no idea *Valentine* v. *Christensen* (1942) 316 U.S. 52 would be disapproved. It is understandable that a busy under-budgeted litigator would enter into such a stipulation to avoid a long trial under such circumstances.

of the matter stipulated simply indulges in hyperbole and characterizations which we believe would bring considerable opprobrium on this Court were is used as the basis of Constitutional fact finding here.[15] Courts which have decided these cases without such stipulations have found to the contrary. Only Stipulations 2 and 28 relate to the question of a total ban. Number 2 is clearly inconsistent with the ordinance itself. Transit vehicles and benches, as well as many other areas, are clearly exempted. Appendix G, pp. 111a and 112a of the Jurisdictional Statement. Moreover, the California Supreme Court limited its application to billboards *per se*,[16] which according to the Stipulation are signs 12 x 24 feet in size or larger. (Stipulation No. 25.) Stipulation No. 2 is grossly misleading. Appellants cannot carry on their large-sign business but all outdoor advertising is not banned. Stipulation No. 28 only implies a partial (at most) exclusion by assuming that some advertisers rely on appellants' signs exclusively. It is vague and a gross exaggeration. Other courts have found that there are adequate alternatives, which makes that stipulation of no probative value. *John Donnelly*, found the argu-

[15] In California stipulations between parties may not bind a court on questions of law or conclusions to be drawn therefrom. *See, Leonard* v. *City of Los Angeles* (1973) 31 C.A.2d 473, 476, hear. den., and cases cited therein. The stipulation is not sufficient in scope to require a judgment. *See, Harris* v. *Spinali Auto Sales, Inc.* (1962) 202 C.A.2d 215, hear. den., "A stipulation made for the purpose of expediting a proceeding (here a summary judgment motion) 'ought not be used as a pitfall'." *Orr* v. *Ford* (1929) 101 C.A. 694, 699. Facts insufficient to a determination of issues presented do not become sufficient because they are introduced by stipulation. *Rubattino* v. *Ind. Acc. Com.* (1944) 65 C.A.2d 288, hear. den. Reviewing courts may judicially notice facts not introduced in evidence below. *People* v. *Stralla* (1939) 14 C.2d 617.

[16] Footnote 2 of that opinion.

ment that billboards were a "unique and distinct medium of communication" inappropriate. *See*, pp. 1279-1280.

2. There Are Adequate Alternative Means of Advertising

Aside from the specific exemptions and limited application of the ordinance, a plethora of the same information found on these giant signs is thrust on the public from every conceivable direction. Everything from Volkswagens painted with cigarette ads, bumper stickers, tee shirts, balloons, buttons, skywriters, to prime time television, remains untouched by these ordinances. There are signs in stores, malls, subways, buses, taxis and so forth. All of those cases which have considered the matter have found adequate alternative channels open. *Stuckey's Stores*, *Newman Signs* and *See*, *Lubbock Poster*, *Suffolk Outdoor*, *Ackerley Communications*, *Veterans of Foreign Wars*, *John Donnelly* and *Art Neon*, (all found billboard exclusion, time, place and manner in scope). Appellants, however, assert that the ordinance as applied to them is, in effect, a total denial of speech because there are no effective alternative channels of communication. We disagree. "Political and cultural messages are not normally confined to a particular situs for their efficacy and may be communicated by less visually damaging channels than billboards adjacent to scenic highways." *State of Washington*, *supra*, at p. 815. *John Donnelly*, also found that many, "if not all," of those messages found on billboards can be

"conveyed" elsewhere on media competitive "in cost" with appellants' signs, at pp. 1279-1280. This Court should not reinvent the wheel, as it were, and ignore what other courts have found on adequate records.

3. The Ordinance Serves Substantial Public Interests

Nothing in the record rebuts the stated purposes of the ordinance. Appendix G, p. 106a of appellants' Jurisdictional Statement. A considerable body of judicial opinion now exists which has found that such ordinances serve the interests of traffic safety. *Markham Advertising; State of Washington; John Donnelly; Veterans of For. Wars; Philanz Oldsmobile, Inc.* v. *Keating* (1976) 51 A.D. 437, 381 N.Y.S. 2d 916; *In re Columbus Outdoor Advertising Co.* (1977) 51 A.D. Ohio 2d 187, 367 N.E. 2d 920 and those other cases cited earlier wherein review by this Court has been denied. The master appointed to do the fact finding in *General Outdoor Advertising* found billboard "restrictions tend to promote public safety." At p. 809. Safety is "unquestionably at the core" of the police power. *Kelley*, at p. 247. On this point appellants have taken the posture in the past that such interference with their business can only be justified upon proof beyond a reasonable doubt that accidents are caused by billboards. That is not the test. This Court, again, need not invent the wheel and ignore all previous hard work on this subject. Both Congress and the California Legislature have found that billboard exclusion will "promote" safety.

23 U.S.C. Sec. 131(a) and Bus. & Prof. Code Sec. 5226.

Those interests in visual integrity, proportion, and so forth, which may be subsumed as aesthetic have also been extensively recognized as served by this kind of ordinance. (The cases are cited in the previous paragraph.) It is now the majority view that aesthetic considerations alone may support an exercise of the police power.[17] 21 A.L.R. 3d 1222. This Court has long recognized that it is "within the power of the legislature to determine that the community should be beautiful" as well as safe and healthy. *Berman* v. *Parker* (1954) 348 U.S. 26, 33, *Acc., Village of Belle Terre* (City as a "sanctuary," at p. 9), *New Orleans* (preservation of the "appearance" of streets, at p. 304) and *Penn Central Transportation* ("quality of life" at p. 134). *Acc. Young*, at p. 71. These signs "often are egregious examples of ugliness, destruction and deterioration." *Suffolk Outdoor Advertising*, at 393 N.Y.S. 2d 416, 420 (N.Y.S. Cts. Opinion). This is a wheel which this Court helped to forge.

General Outdoor Advertising, and other courts, have recognized that off-site advertising intrudes on unwilling viewers.[18] The court in *Veterans of For. Wars* found *Kovacs* apposite. "To enforce freedoms

[17] Courts have recognized that those considerations termed "aesthetic" necessarily have an economic impact as well. *County of Fayettte* v. *Holman* (1973) 11 Pa. Comwlth. 357, 345 A.2d 235, *Veterans of For. Wars* and *John Donnelly*.

[18] It is "forcibly thrust" on persons who "strongly wish to avoid" it but "cannot enjoy their natural rights to proceed unmolested," at p. 809. It is a "foisting" upon "the mass of the public against their desire," at p. 814.

of speech in disregard of the rights of others would be harsh and arbitrary itself." (*Kovacs* at p. 88.) This Court was not "insensitive to claims by citizens to comfort and convenience." At p. 88. The interest of private shopping centers in maintaining a "controlled, carefree environment" outweighed time honored First Amendment activitiy. *Lloyd*, at p. 554. "We think those communities that have found these methods of sale obnoxious may control them by ordinance." *Breard*, at pp. 644-645. "The radio can be turned off, but not so the billboard or street car placard." *Lehman*, at p. 302 (quoting *Packer Corp.*) Freedom from unsolicited and unavoidable advertising is most unusual in the urban setting today.[19] Because the billboard has no functional relationship to its surroundings, it is also the inescapable reminder that the values of the market place may yet subordinate all other values.

4. The Ordinance, As Interpreted, Is Not Too Restrictive

From a theoretical point of view San Diego could have written a narrower ordinance.[20] However, as a practical matter, the ordinance only covers commercial billboards.[21] Most, if not all, other means of out-

[19] Except in those special places where judges and legislators reside. Those areas of inner cities long since abandoned by the affluent have become billboard alleys.

[20] Something which can be said of most legislation. Appellants' inability to show that alternative channels do not exist is, on the other hand, the fatal weakness in this case.

[21] The term "off-site advertising" is only a device for defining billboards. Bus posters, benches, etc. are exempted by the ordinance. The purpose of the ordinance is to remove these large structures, not advertising. *See, Veterans of For. Wars* and footnote 2 of the California Court's opinion. While the device may be somewhat imperfect, perfection is not the requirement. *See, Massachusetts Bd. Retirement*, at p. 314.

door advertising currently in use are exempted. Jurisdictional Statement, p. 111a. The California Court (without reference to the exemptions) so interpreted it. (Footnote 2) Were the ordinance more specific in the terms by which it accomplished its purpose of ridding San Diego of these huge signs, appellants' arguments would remain unchanged. Alameda has a different (and atypical) ordinance which limits *all* signs to fifty square feet, prohibits roof signs and requires that off-site signs be at least two hundred feet apart.[22] In view of the regulations already approved by this Court, there should be no question about the validity of those regulations. In the Alameda litigation appellants attack that ordinance on precisely the same basis as they attack this ordinance. The new theory they seek to mask in traditional arguments is that anything which does not permit (at least) 12 x 24 foot signs at well-traveled intersections destroys a "media of communication." They assimilate their present way of doing business to the "First Amendment" by way of the "media" ploy. They argued to the trial court in the Alameda case that Alameda's regulations were a "sham" because those regulations did not accommodate their present standard-sized copy and therefore were a "total ban." The real thrust of their effort has always been to create a vested

[22] Appellants claim this case does not concern such regulations. They are careful not to concede the validity of such regulations. Jurisdictional Statement, at pp. 13-14. If this case is reversed they will cite it as authority that those regulations are invalid, the theory being that any regulation which does not accommodate their standardization copy is a "total ban." They insist on assimilating "their business" to "outdoor advertising." The two are not the same thing.

right in the *status quo*. The California Supreme Court did not permit the imperfections of the ordinance (or advocacy) to be used in that fashion. Rather than give the sparse and questionable stipulations more import than they deserve (at a cost to all other cities) that Court narrowly construed the ordinance. To invalidate it, even with *dicta* supporting the considerably restrictive regulations already approved by this Court, would encourage appellants' theory that their (12 x 24 plus) structures are protected by the First Amendment simply because they have been permitted to do business that way in the past.

The proper frame of reference for this issue is not gained by focusing on existing signs, but rather by reference to cities with no billboards. The precise First Amendment question is: Does the First Amendment guarantee the use of large billboards located (necessarily) at heavily traveled points, in all (or most) cities? The validity of zoning is viewed from prospective application. If valid prospectively, amortization becomes the issue. Must a city without billboards permit them (particularly in the 12 x 24 plus variety)? That would be the impact of reversal in this case.[23] The record only establishes that appellants have used large signs in San Diego for a period of years. A reversal on this record would also make it difficult to enforce even ordinances (like Alameda's) which specifically limit only the size and concentration of billboards.

[23] Many newer communities in California have never permitted billboards. Reversal here would necessarily place those ordinances in jeopardy.

Even if this Court were to require every city to accommodate some form of billboard, certainly the huge variety in vogue now need not be protected to serve First Amendment ends. Neither San Diego, or any other city, should be required to start from scratch the effort to eliminate the very large signs now in use. This Court has traditionally ruled on the narrowest possible Constitutional issue to avoid unintended inferences and confusion. *See, Agins, infra,* the Court need hold here is that the First Amendment does not protect the type of sign described by Stipulation No. 25. If this Court is going to also take the position that some form of billboard (as distinguished from other forms of outdoor advertising permitted by the ordinance[24]) must be permitted, it is best to do that by limiting the application of the ordinance. Otherwise, the case may be misconstrued, to frustrate any changes in the *status quo,* in all kinds of contexts, for years. There are far too many more difficult problems ahead for legislators which can only be solved by disturbing the *status quo.*

THE DUE PROCESS ISSUE

V.

INTRODUCTION

Appellants' Jurisdictional Statement on due process only makes additional First Amendment argu-

[24] There are no total bans on outdoor advertising anywhere (unless the Court accepts appellants' unstated premise that their signs *are* outdoor advertising). Ordinances are either not city-wide, contain exemptions, or apply (as construed here) in a limited manner. Considering the plethora of advertising media in use, it is difficult to imagine why the Constitution should be offended even by a ban on billboards of any size.

ments in a Due Process guise. Knowing that courts have almost uniformly rejected vested rights arguments as a talisman against the exercise of the police power, they seek to mask the vested rights argument in a "hybrid" of the First and Fourteenth Amendments. The "property" appellants seeks to protect is the use of the public streets (the public's investment) to carry out their business. Their *actual* property consists of trucks, typewriters, signs, leases, and so forth. Only the leases will be lost or without salvage value. The Stipulation only indicates a "fair market value" of the signs on an unspecified date. Appendix 14, p. 123a of the Jurisdictional Statement. That figure is irrelevant to the exercise of the police power.

VI.

AN EXERCISE OF THE POLICE POWER IS NOT INVALID MERELY BECAUSE IT WOULD PREVENT THE OPERATION OF A PARTICULAR BUSINESS

Again, the place to start is with a city that has no billboards. Must that city permit the erection of billboards within its limits? The answer, at least since *Hadacheck* v. *Los Angeles* (1915) 239 U.S. 394, has been "no." A comprehensive review of the cases and theories of "taking" was recently published by this Court in *Penn Central.* We will not review all of the cases cited therein. This Court relied on that research in its most recent case. *Agins* v. *City of Tiburon* (1980) ....U.S....., 100 S.Ct. 2138. It is sufficient to say that the Constitution has never guar-

anteed that one may use his property (trucks, typewriters, etc.) to engage in a particular business. Apparently, appellants hope to use the First Amendment to bootstrap a Fifth Amendment argument that, for the benefit of their advertisers, they have the right to engage in a particular business. A "taking" in the due process sense is only shorthand (word of art) for "unreasonable, arbitrary or capricious." A "taking" and a valid exercise of the police power are mutually exclusive concepts absent some kind of physical invasion of the property, which justifies the finding of a "taking" in the eminent domain sense (a different word of art).[25] The real properties upon which the signs rest remain unfettered for other uses. *Modjeska Sign Studios* v. *Berle* (1977) 43 N.Y.2d 468, 402 N.Y.S.2d 359, *app. dism.*, 439 U.S. 809. "By merely entering into a lease specifically for the purpose of erecting a billboard, a lessee is not immunized from regulation of billboards under the police power." *Modjeska*, at p. 365.

VII.

AMORTIZATION OF NONCONFORMING USES IS NOT INCONSISTENT WITH DUE PROCESS

Appellants would like to continue to use the public investment in streets from that monopoly position

[25] We do not discuss here the issue of whether or not a provision which bars all reasonable use of property is a "taking" in the eminent domain sense. As a matter of policy we would hope that, absent a physical invasion, the remedy would remain invalidation of those ordinances and not inverse condemnation. Extremely difficult practical and theoretical problems would ensue from confounding further the two meanings of "taking" by assimilating one to the other.

which the very ordinance under attack gave them for so many years. The prospective application of the ordinance does not really concern them.[26] However, they must attack that to give the removal argument credence.

Noxious uses (*per se* nuisances) of property may be abated without compensation or delay. The public cannot use (or invade) property without paying for it. Amortization is the "middle ground between prospective and retroactively" applied zoning laws. *Modjeska*, at p. 366. Nonconforming uses are nuisances (by definition) under zoning law. Abating a nuisance (by definition) immediately and without compensation puts too great a burden of the police power on individuals. Requiring payment places a burden on the exercise of the police power. Amortization is the way of "ameliorating" those burdens. *Modjeska*, at p. 366. Amortization serves a useful purpose. A leading case "pointed out that early optimism about spontaneous withering away of nonconforming uses has proved erroneous, and that they often flourished because of their monopolistic positions." 22 ALR3d 1134, 1138, Annotation: "Nonconforming Uses Amortization." Inability to eliminate nonconforming use may completely stifle zoning objectives. Condemnation has no application to these provisions which are "generally upheld." *Art Neon*, at p. 123. The fairness

[26] When the San Diego ordinance was declared invalid below, new permits were issued for the first time in years. Appellants were not happy with that. Prospective application of the ordinance cuts their competition.

of amortization is clear in the context of billboard regulation. Their value was created by government through its investment in highways.

Recovery of investment sufficiently ameliorates the private loss. *Modjeska, Lubbock Poster Co.* and 22 ALR 3d 1134. Loss of the expectation of more is not compensable or reason to frustrate a zoning scheme. That is the price of living in an orderly society. To expect a return of the present market value, or even the market value at time of adoption of the ordinance, (by payment or amortization) frustrates changes and improvements (as if the emergence of a better zoning scheme proves that the government was once foolish and has to pay for that). The Constitution has never made the government the guarantor of profits or appreciated values, particularly when those values are originally created by government itself. *Agins*, (down-zoning). Appellants are permitted to both stay in business long enough to substantially recover what they put into the business while retaining the assets as well. There is no property right to continue a business inconsistent with public safety, health and welfare. No greater burden of proof of the efficacy of the regulation is required merely because amortization is involved. If the regulation is valid prospectively, the business can be reasonably amortized. The people do not have to prove, beyond a reasonable doubt, the efficacy of the regulation merely because it includes amortization. That is appellants' approach.

This issue is not ripe for review in any case. The California Court remanded to the trial court the issue of how much time was reasonable. Alameda recently completed a trial on that issue. After extensive discovery and testimony by CPAs for both sides the trial court found that in seven and one-half years the billboard defendants had recovered not only all of their historical costs for their signs, but all or most of the fair market value of the signs as of the date of the passage of the ordinance requiring removal. It hardly comports with the dignity which the Constitution invests in the police power to require compensation for the present market value as well.

VIII

THE BOTTOM LINE

Due to calendar problems we prepared this brief from the matters set forth in the Jurisdictional Statement.[27] Just before printing San Diego graciously forwarded copies of the appellant (and amici) briefs to us. No surprises were found therein. Arguments are even more heavily buttressed by concepts which would create a vested right to do business as usual than we anticipated.[28] The application of these arguments to cities which presently have no billboards (or any kind of off-site signs) is totally ignored, as if nothing mattered about this litigation except appel-

[27] Some *Amici* have not read it. Equal protection is not raised therein.

[28] The vacated opinion of the California Court of Appeals is a monument to those concepts. The opinion is contrary to all prior precedent.

lants' ability to do business as usual. Were the business being conducted of any other nature, none of those arguments could even be suggested. The import of the ordinance is exaggerated beyond recognition. Signs on or in stores, malls, taxis, buses, subways, lawns, etc. are still signs. Eliminating billboards is no more control over content than defining frequencies, band widths and power settings for radio. That is particularly true if the application of the ordinance were limited to the large signs defined by the Stipulation. As a practical matter it is most convenient to use a definition of off-site advertising to define the huge structures that are presently located precisely in those locations where they do the most damage in terms of the concerns addressed by the ordinance. That technique does not result in curtailment of advertising, except by semantic manipulation in arguments. The California Court cut through those semantics. If that technique is rejected on Constitutional grounds to require a more specific technique (e.g., size and location limits *per se*) the effort to bring some discipline to sign advertising should not be put back another twenty years by a decision which requires the whole effort to start from scratch.

If doing loop-the-loops in airplanes were dangerous, skywriters would not be constitutionally exempted from a law forbidding them on the representation that loop-the-loops are required to make the letter "O." A condemned building is not spared the

bulldozer because it has a sign painted on it. Ogden Nash's poem is charming because it demonstrates (as only the artist can) the pomposity of those structures.[29] Scholarly dissertations on the constitutionality of billboards would certainly delight Charles Dickens. After seven years of it this writer finds himself looking over his shoulders to see if the little boy is pointing his finger at us or if the bailiff has turned into the Queen of Hearts. What is at stake here is a very profitable way of operating one advertising business, made very profitable by the very regulations at issue and other laws banning cigarette and liquor ads on electronic media. No constitutional values are endangered, unless that document has become so devitalized by the values of the market place that it now protects the most profitable way of doing business. Air pollution regulations necessarily increase the cost of paper, still the prime medium of communication. No one would interject the Constitution into the context of protecting that environment. Other businesses suffer the costs of changing their technology. Advertising will survive without huge signs.

Ingenuous efforts to convince this Court that the ordinance is a total ban on outdoor advertising only beg the question by providing a mask for the value judgment which this Court must necessarily make.[30]

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[29] That is graphically demonstrated by the pictures appellants have so carefully manufactured for the benefit of this litigation. It matters not what the content of the ad is, the media is the message. Billboards' complete lack of proportion or relation to their surroundings convey a very clear message: Nothing is more important than the selling.

[30] The California Court declined the invitation to wear such a mask, hence the Ogden Nash piece. The dissenting opinion adopts the mask.

That stratagem is result-oriented, merely another way of stating the desired conclusion. The ordinance is a total ban only if this Court requires the rest of the world to interpret it that way. Facially it is not a *total* ban. The California Court limited its application further (commercial billboards). This Court could limit it further yet. If the ordinance, as interpreted, is not narrow enough then limiting its application to the 12 x 24 plus commercial billboard is certainly narrow enough. The issue here is not whether or not a total ban on outdoor advertising is constitutional or not. No such thing actually exists today. In the living, breathing world outside the warp of legal proceedings, the question is whether or not communities that have billboards can correct that error and whether cities that do not have them must embrace them. Is this Court going to both require all communities to embrace commercial billboards *and* forbid them from determining the size and location of those structures? That would be a remarkable break with precedent. There is a world of difference between a decision which holds the ordinance valid as applied to the large billboards in vogue (and in issue here) while stating that it cannot be applied to appreciably smaller signs because some form of billboard must be permitted (subject to time, place and manner regulations), and a decision which holds, or even implies, that the Constitution protects 12 x 24 plus signs simply because they exist (and therefore necessarily have been utilized). If all communities

must embrace commercial off-site signs, in addition to those exempted by this ordinance, then the cities of America deserve an assurance that they can control the size and location thereof to prevent the kind of sign chaos now existing in San Diego and other cities.[31]

Justice is not done by going back to square one on the huge signs. The device of using off-site advertising as a convenient definition for large commercial billboards was certainly valid under *Valentine* when those ordinances were passed.

Justice is not done by requiring cities that never permitted these signs to embrace them. If they had been the target of this lawsuit none of the arguments made here could have been made there.

Justice is not done by granting vested rights to those who just happen to be in the business of renting huge signs today.

Other businesses have endured dramatic changes in technology. If we must endure commercial billboards then let them be reasonable. Standard Oil, Shell, McDonalds, and other businesses which swore they would never come to town if they were not allowed their big signs, came to town with small signs in hand when the bluff failed. As the San Diego

[31] Alameda switched to size and location some years ago out of an abundance of caution. We still see nothing wrong, however, constitutionally with the San Diego ordinance. Undoubtedly, any meaningful size limit would not permit the present huge signs.

ordinance stands, it leaves plenty of room to advertise. If the Court thinks the ordinance too broad, the industry can certainly survive without the big signs. To use the Constitution as the champion of those structures does nothing for the dignity of that document.

CONCLUSION

The decision of the California Supreme Court should be sustained.

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